

Assigned for all purposes to: Stanley Mosk Courthouse, Judicial Officer: Michael Linfield

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10 CONSUMER ADVOCACY GROUP, INC.

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

12 **COUNTY OF LOS ANGELES**

13 CONSUMER ADVOCACY GROUP, INC.,  
14 in the public interest,

15 Plaintiff,

16 v.

17 SAKS & COMPANY, LLC, a Delaware  
18 Limited Liability Company;  
19 E.S. ORIGINALS, INC., a New York  
20 Corporation;  
21 and DOES 1-10,

22 Defendants.

23 CASE NO. 20STCV27943

24 COMPLAINT FOR PENALTY AND  
25 INJUNCTION

26 Violation of Proposition 65, the Safe  
27 Drinking Water and Toxic Enforcement  
28 Act of 1986 (*Health & Safety Code, §  
25249.5, et seq.*)

ACTION IS AN UNLIMITED CIVIL  
CASE (exceeds \$25,000)

29 Plaintiff CONSUMER ADVOCACY GROUP, INC. alleges one cause of action against  
30 defendants SAKS & COMPANY, LLC; E.S. ORIGINALS, INC., and DOES 1-10 as follows:  
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**THE PARTIES**

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2 1. Plaintiff CONSUMER ADVOCACY GROUP, INC. (“Plaintiff” or “CAG”) is an  
3 organization qualified to do business in the State of California. CAG is a person within  
4 the meaning of Health and Safety Code Section 25249.11, subdivision (a). CAG, acting  
5 as a private attorney general, brings this action in the public interest as defined under  
6 Health and Safety Code Section 25249.7, subdivision (d).
- 7 2. Defendant SAKS & COMPANY, LLC (“SAKS LLC”) is a Delaware Limited Liability  
8 Company doing business in the State of California at all relevant times herein.
- 9 3. Defendant E.S. ORIGINALS, INC. (“ESO”) is a New York Corporation doing business  
10 in the State of California at all relevant times herein.
- 11 4. Plaintiff is presently unaware of the true names and capacities of defendants DOES 1-10,  
12 and therefore sues these defendants by such fictitious names. Plaintiff will amend this  
13 Complaint to allege their true names and capacities when ascertained. Plaintiff is  
14 informed, believes, and thereon alleges that each fictitiously named defendant is  
15 responsible in some manner for the occurrences herein alleged and the damages caused  
16 thereby.
- 17 5. At all times mentioned herein, the term “Defendants” includes SAKS LLC, ESO, and  
18 DOES 1-10.
- 19 6. Plaintiff is informed and believes, and thereon alleges that each of the Defendants at all  
20 times mentioned herein have conducted business within the State of California.
- 21 7. Upon information and belief, at all times relevant to this action, each of the Defendants,  
22 including DOES 1-10, was an agent, servant, or employee of each of the other  
23 Defendants. In conducting the activities alleged in this Complaint, each of the  
24 Defendants was acting within the course and scope of this agency, service, or  
25 employment, and was acting with the consent, permission, and authorization of each of  
26 the other Defendants. All actions of each of the Defendants alleged in this Complaint  
27 were ratified and approved by every other Defendant or their officers or managing  
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1 agents. Alternatively, each of the Defendants aided, conspired with and/or facilitated the  
2 alleged wrongful conduct of each of the other Defendants.

- 3 8. Plaintiff is informed, believes, and thereon alleges that at all relevant times, each of the  
4 Defendants was a person doing business within the meaning of Health and Safety Code  
5 Section 25249.11, subdivision (b), and that each of the Defendants had ten (10) or more  
6 employees at all relevant times.

7 **JURISDICTION**

- 8 9. The Court has jurisdiction over this lawsuit pursuant to California Constitution Article  
9 VI, Section 10, which grants the Superior Court original jurisdiction in all causes except  
10 those given by statute to other trial courts. This Court has jurisdiction over this action  
11 pursuant to Health and Safety Code Section 25249.7, which allows enforcement of  
12 violations of Proposition 65 in any Court of competent jurisdiction.

- 13 10. This Court has jurisdiction over Defendants named herein because Defendants either  
14 reside or are located in this State or are foreign corporations authorized to do business in  
15 California, are registered with the California Secretary of State, or who do sufficient  
16 business in California, have sufficient minimum contacts with California, or otherwise  
17 intentionally avail themselves of the markets within California through their  
18 manufacture, distribution, promotion, marketing, or sale of their products within  
19 California to render the exercise of jurisdiction by the California courts permissible  
20 under traditional notions of fair play and substantial justice.

- 21 11. Venue is proper in the County of Los Angeles because one or more of the instances of  
22 wrongful conduct occurred, and continues to occur, in the County of Los Angeles and/or  
23 because Defendants conducted, and continue to conduct, business in the County of Los  
24 Angeles with respect to the consumer product that is the subject of this action.

25 **BACKGROUND AND PRELIMINARY FACTS**

- 26 12. In 1986, California voters approved an initiative to address growing concerns about  
27 exposure to toxic chemicals and declared their right “[t]o be informed about exposures to  
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1 chemicals that cause cancer, birth defects, or other reproductive harm." Ballot Pamp.,  
2 Proposed Law, Gen. Elec. (Nov. 4, 1986) at p. 3. The initiative, The Safe Drinking  
3 Water and Toxic Enforcement Act of 1986, codified at Health and Safety Code Sections  
4 25249.5, *et seq.* ("Proposition 65"), helps to protect California's drinking water sources  
5 from contamination, to allow consumers to make informed choices about the products  
6 they buy, and to enable persons to protect themselves from toxic chemicals as they see  
7 fit.

8 13. Proposition 65 requires the Governor of California to publish a list of chemicals known  
9 to the state to cause cancer, birth defects, or other reproductive harm. *Health & Safety*  
10 *Code* § 25249.8. The list, which the Governor updates at least once a year, contains over  
11 700 chemicals and chemical families. Proposition 65 imposes warning requirements and  
12 other controls that apply to Proposition 65-listed chemicals.

13 14. All businesses with ten (10) or more employees that operate or sell products in California  
14 must comply with Proposition 65. Under Proposition 65, businesses are: (1) prohibited  
15 from knowingly discharging Proposition 65-listed chemicals into sources of drinking  
16 water (*Health & Safety Code* § 25249.5), and (2) required to provide "clear and  
17 reasonable" warnings before exposing a person, knowingly and intentionally, to a  
18 Proposition 65-listed chemical (*Health & Safety Code* § 25249.6).

19 15. Proposition 65 provides that any person "violating or threatening to violate" the statute  
20 may be enjoined in any court of competent jurisdiction. *Health & Safety Code* §  
21 25249.7. "Threaten to violate" means "to create a condition in which there is a  
22 substantial probability that a violation will occur." *Health & Safety Code* § 25249.11(e).  
23 Defendants are also liable for civil penalties of up to \$2,500.00 per day per violation,  
24 recoverable in a civil action. *Health & Safety Code* § 25249.7(b).

25 16. Plaintiff identified certain practices of manufacturers and distributors of Flip Flops of  
26 exposing, knowingly and intentionally, persons in California to Diisononyl Phthalate, of  
27 such products without first providing clear and reasonable warnings of such to the  
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1 exposed persons prior to the time of exposure. Plaintiff later discerned that Defendants  
2 engaged in such practice.

3 17. On December 20, 2013, the Governor of California added Diisononyl Phthalate  
4 (“DINP”) to the list of chemicals known to the State to cause cancer (*Cal. Code Regs. tit.*  
5 27, § 27001(b)). Pursuant to Health and Safety Code sections 25249.9 and 25249.10,  
6 twenty (20) months after addition of DINP to the list of chemicals known to the State to  
7 cause cancer, DINP became fully subject to Proposition 65 warning requirements and  
8 discharge prohibitions.

9 **SATISFACTION OF PRIOR NOTICE**

10 18. Plaintiff served the following notices for alleged violations of Health and Safety Code  
11 Section 25249.6, concerning consumer products exposures:

12 a. On or about October 23, 2019 Plaintiff gave notice of alleged violations of  
13 Health and Safety Code Section 25249.6, concerning consumer products  
14 exposures subject to a private action to SAKS LLC, ESO and to the California  
15 Attorney General, County District Attorneys, and City Attorneys for each city  
16 containing a population of at least 750,000 people in whose jurisdictions the  
17 violations allegedly occurred, concerning the Flip Flops with Plastic  
18 Components.

19 19. Before sending the notice of alleged violations, Plaintiff investigated the consumer  
20 products involved, the likelihood that such products would cause users to suffer  
21 significant exposures to DINP, and the corporate structure of each of the Defendants.

22 20. Plaintiff’s notice of alleged violation included a Certificate of Merit executed by the  
23 attorney for the noticing party, CAG. The Certificate of Merit stated that the attorney for  
24 Plaintiff who executed the certificate had consulted with at least one person with relevant  
25 and appropriate expertise who reviewed data regarding the exposures to DINP, the  
26 subject Proposition 65-listed chemical of this action. Based on that information, the  
27 attorney for Plaintiff who executed the Certificate of Merit believed there was a  
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1 reasonable and meritorious case for this private action. The attorney for Plaintiff  
2 attached to the Certificate of Merit served on the Attorney General the confidential  
3 factual information sufficient to establish the basis of the Certificate of Merit.

4 21. Plaintiff's notice of alleged violations also included a Certificate of Service and a  
5 document entitled "The Safe Drinking Water & Toxic Enforcement Act of 1986  
6 (Proposition 65) A Summary." *Health & Safety Code § 25249.7(d)*.

7 22. Plaintiff is commencing this action more than sixty (60) days from the dates that Plaintiff  
8 gave notice of the alleged violations to SAKS LLC, and the public prosecutors  
9 referenced in Paragraph 18a.

10 23. Plaintiff is informed, believes, and thereon alleges that neither the Attorney General, nor  
11 any applicable district attorney or city attorney has commenced and is diligently  
12 prosecuting an action against the Defendants.

13 **FIRST CAUSE OF ACTION**

14 **(By CONSUMER ADVOCACY GROUP, INC. and against SAKS LLC, ESO, and**  
15 **DOES 1-10 for Violations of Proposition 65, The Safe Drinking Water and Toxic**  
16 **Enforcement Act of 1986 (*Health & Safety Code, §§ 25249.5, et seq.*))**

17 **Flip Flops**

18 24. Plaintiff repeats and incorporates by reference paragraphs 1 through 23 of this complaint  
19 as though fully set forth herein.

20 25. Each of the Defendants is, and at all times mentioned herein was, a manufacturer,  
21 distributor, promoter, or retailer of Flip Flops with Plastic Components ("Flip Flops"),  
22 including but not limited to "Juicy Couture los angeles, California;" "ES0505;"  
23 "PO#343369;" "MADE IN CHINA;" "0914 077;" "191045826769;" "JC PALMDALE  
24 METALLIC EVA BLUE PINK 1;" "1 91045 82676 9;"

25 26. Flip Flops contains DINP.

26 27. Defendants knew or should have known that DINP has been identified by the State of  
27 California as a chemical known to cause cancer, and therefore was subject to Proposition  
28 65 warning requirements. Defendants were also informed of the presence of DINP in

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Flip Flops within Plaintiff's notice of alleged violations further discussed above at Paragraph 18a.

28. Plaintiff's allegations regarding Flip Flops concerns "[c]onsumer products exposure[s]," which "is an exposure that results from a person's acquisition, purchase, storage, consumption, or other reasonably foreseeable use of a consumer good, or any exposure that results from receiving a consumer service." *Cal. Code Regs. tit. 27, § 25602(b)*. Flip Flops are consumer products, and, as mentioned herein, exposures to DINP took place as a result of such normal and foreseeable consumption and use.

29. Plaintiff is informed, believes, and thereon alleges that between October 23, 2016 and the present, each of the Defendants knowingly and intentionally exposed California consumers and users of Flip Flops, which Defendants manufactured, distributed, or sold as mentioned above, to DINP, without first providing any type of clear and reasonable warning of such to the exposed persons before the time of exposure. Defendants have distributed and sold Flip Flops in California. Defendants know and intend that California consumers will use and consume Flip Flops, thereby exposing them to DINP. Defendants thereby violated Proposition 65.

30. The principal routes of exposure are through dermal contact, ingestion and inhalation. Persons sustain exposures by handling Flip Flops without wearing gloves or any other personal protective equipment, or by touching bare skin or mucous membranes with gloves after handling Flip Flops, as well as through direct and indirect hand to mouth contact, hand to mucous membrane, or breathing in particulate matter dispersed from Flip Flops.

31. Plaintiff is informed, believes, and thereon alleges that each of Defendants' violations of Proposition 65 as to Flip Flops have been ongoing and continuous, as Defendants engaged and continue to engage in conduct which violates Health and Safety Code Section 25249.6, including the manufacture, distribution, promotion, and sale of Flip

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Flops, so that a separate and distinct violation of Proposition 65 occurred each and every time a person was exposed to DINP by Flip Flops as mentioned herein.

32. Plaintiff is informed, believes, and thereon alleges that each violation of Proposition 65 mentioned herein is ever continuing. Plaintiff further alleges and believes that the violations alleged herein will continue to occur into the future.

33. Based on the allegations herein, Defendants are liable for civil penalties of up to \$2,500.00 per day per individual exposure to DINP from Flip Flops, pursuant to Health and Safety Code Section 25249.7(b).

34. Plaintiff has engaged in good faith efforts to resolve the claims alleged herein prior to filing this Complaint.

**PRAYER FOR RELIEF**

Plaintiff demands against each of the Defendants as follows:

1. A permanent injunction mandating Proposition 65-compliant warnings;
2. Penalties pursuant to Health and Safety Code Section 25249.7, subdivision (b);
3. Costs of suit;
4. Reasonable attorney fees and costs; and
5. Any further relief that the court may deem just and equitable.

Dated: July 23, 2020

YEROUSHALMI & YEROUSHALMI\*

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Reuben Yeroushalmi  
Attorneys for Plaintiff,  
CONSUMER ADVOCACY GROUP, INC.